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Yap Yen Piow v Hee Wee Eng

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-1436–09 OF 2015
HAMID SULTAN, ABDUL RAHMAN SEBLI AND PRASAD ABRAHAM JJCA
4 NOVEMBER 2016

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Family Law — Matrimonial property — Division of assets — Whether High Court's order for division of matrimonial and non-matrimonial property in keeping with s 76 of the Law Reform (Marriage and Divorce) Act 1976

D After 37 years of marriage and having three grown-up children, the appellant ('Yap'), a medical doctor, filed for divorce from his wife, the respondent ('Hee'), a nurse turned home-maker. The couple's marriage, however, had broken down 15 years before the presentation of the divorce petition but they continued to live separately in the same matrimonial home. Yap's instant appeal was over the E division of property ordered by the High Court when it granted the decree nisi. The court ordered: (a) Hee to transfer her half-share in the matrimonial home to Yap who was to pay her RM800,000 in cash. Alternatively, proceeds from the sale of the home, less any loan repayment outstanding upon it, was to be divided equally between the parties; (b) Hee to be given a half-share in a F property in Australia ('the Australian property') which Yap bought for his daughter's use; (c) Hee to move into a condominium ('the condominium') within three months and, if she did not do so, Yap was to pay her RM3,150 a month to rent a place; (d) Yap to buy a new car for Hee within three months during which time she could use one of Yap's three cars; (e) Yap to pay Hee half G of the balance in his EPF account within 60 days ('the EPF monies') and also pay her RM5,000 a month as maintenance; (f) Yap to transfer to Hee ownership of a burial plot ('the burial plot') he had bought (this order was not appealed against); (g) Yap to sell off his clinic ('the clinic') and pay Hee half the proceeds of its sale; (h) Yap to sell off a house in Wisma Pantai ('Wisma Pantai H house'), a shop lot in Nilai ('Nilai property'), and a durian orchard in Sungai Muntoh in Negeri Sembilan (' the orchard') and pay Hee one-third of the proceeds of their sale; and (i) Yap to pay Hee one-third of the value of stocks/shares he owned ('the stocks and shares') and pay the annual premium for Hee's medical insurance policy ('the policy premium'). In the instant I appeal, Yap contended that the division of property ordered by the High Court should be set aside as it was grossly unjust and that it contravened the provisions of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and failed to take into account relevant matters. He said the Australian property, Wisma Pantai house, Nilai property and the orchard were acquired

by him for investment purposes after his separation from Hee and they were not matrimonial assets as both parties had never lived in any of them. Similarly, he said, he bought the stocks and shares for his own investment after the separation. As for the Australian property, Yap said although it was registered in the joint names of the parties, it was always intended to be held on trust as an eventual gift for their daughter, Yap Yee Ling. Yap said the High Court failed to sufficiently consider that during his 15-year separation from Hee, she never provided any financial contribution towards the acquisition of assets, nor did she look after the welfare of the matrimonial home or care for the family. With regard to maintenance, Yap said the High Court should not have disturbed the RM3,000 monthly maintenance he had been paying Hee prior to the grant of the decree nisi, as she had never complained that that sum was inadequate.

Held, allowing the appeal in part and: (a) setting aside the High Court's orders in respect of the Wisma Pantai house, the orchard, the Nilai property, the clinic, the stocks and shares, the policy premium and the condominium; (b) affirming the High Court's orders with regard to the matrimonial home and the burial plot; (c) ordering the parties to hold the Australian property in trust for their daughter, Yap Yee Ling; (d) ordering Yap to pay Hee a lump-sum maintenance amount of RM8,150; (e) reducing Hee's share in the EPF monies to one-quarter; and (f) ordering Yap's three cars to be sold and the proceeds to be equally divided between the parties but giving either party the option to own one or more of the said vehicles subject to him/her paying half the vehicle's market value to the other party:

(1) If Parliament had intended that all assets which were acquired during the marriage ought to be divided, it would have clearly done so. It was not for the court to fill any gap in the law and construct the provisions of the Law Reform (Marriage and Divorce) Act 1976 by widening the scope of relief based on other jurisdictions which did not have pari materia provisions (see para 6).

(2) The division of matrimonial property — which related to property acquired by the joint efforts of the spouses and fell under s 76(1) of the Act — was permissible as of right. But for non-matrimonial property — ie property acquired through the sole effort of one spouse and fell under s 76(3) of the Act or property which fell under s 76(5) — the division was not permissible as of right unless the Act clearly said so or provided for a methodology to do so. The court had a discretion to deal with non-matrimonial property justly (see paras 3, 5 & 14).

[Bahasa Malaysia summary

Selepas 37 tahun perkahwinan dan mempunyai tiga anak yang sudah besar, perayu ('Yap'), seorang doktor perubatan, memfailkan perceraian daripada isterinya, responden ('Hee'), seorang jururawat yang menjadi suri rumah. Perkahwinan pasangan ini, walau bagaimanapun telah berkecai 15 tahun

sebelum presentasi petisyen perceraian tetapi mereka terus untuk tinggal berasingan di dalam rumah perkahwinan. Rayuan Yap ini adalah atas pembahagian hartanah yang diperintah oleh Mahkamah Tinggi apabila ia memberikan *decree nisi*. Mahkamah memerintahkan: (a) Hee untuk memindahkan sebahagian syernya di dalam rumah perkahwinan kepada Yap yang akan membayarnya tunai sebanyak RM800,000. Secara alternatif, keuntungan daripada jualan rumah tersebut, tolak apa-apa bayaran balik pinjaman yang belum dibayar, dibahagikan secara rata di antara kedua-dua pihak; (b) Hee diberikan sebahagian syer dalam hartanah di Australia ('hartanah Australia') yang mana Yap beli untuk kegunaan anak perempuannya; (c) Hee dikehendaki berpindah ke pangsapuri ('pangsapuri tersebut') dalam masa tiga bulan dan, jika tidak berbuat sedemikian, Yap dikehendaki membayar kepadanya RM3,150 sebulan untuk menyewa rumah; (d) Yap dikehendaki membeli kereta baru untuk Hee dalam masa tiga bulan dan pada masa ini dia boleh menggunakan salah satu daripada tiga kereta yang dimiliki oleh Yap; (e) Yap dikehendaki membayar Hee sebahagian baki dalam akaun EPFnya dalam masa 60 hari ('wang EPF') dan juga membayarnya RM5,000 sebulan sebagai nafkah; (f) Yap dikehendaki memindahkan kepada Hee milikan tanah kubur ('tanah kubur') yang dibeli olehnya (perintah ini tidak dirayukan terhadapnya); (g) Yap dikehendaki menjual kliniknya ('klinik') dan membayar Hee sebahagian daripada keuntungan jualannya; (h) Yap dikehendaki menjual rumah di Wisma Pantai ('rumah Wisma Pantai'), lot kedai di Nilai ('hartanah Nilai'), dan dusun durian di Sungai Muntoh di Negeri Sembilan ('dusun tersebut') dan membayar Hee satu pertiga daripada keuntungan jualan mereka; dan (i) Yap dikehendaki membayar Hee satu pertiga nilai stok/saham yang dimilikinya ('stok dan saham') dan membayar premium tahunan bagi polisi insurans perubatan Hee ('premium polisi'). Dalam rayuan ini, Yap berhujah bahawa pembahagian hartanah yang diperintahkan oleh Mahkamah Tinggi patut diketepikan kerana ia adalah terlalu tidak adil dan ia bertentangan s 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') dan gagal untuk mengambil kira perkara-perkara relevan. Dia menyatakan bahawa hartanah Australia, rumah Wisma Pantai, hartanah Nilai dan dusun diperolehi olehnya bagi tujuan pelaburan selepas perpisahannya daripada Hee dan ia bukan aset perkahwinan kerana kedua-dua pihak tidak pernah tinggal dalam mana-mana hartanah tersebut. Sama juga, dia menyatakan, dia membeli stok dan saham bagi pelaburannya sendiri selepas perpisahan. Mengenai hartanah Australia, Yap menyatakan walaupun ia didaftarkan dalam nama bersama pihak-pihak, ia selalu diniatkan untuk dipegang atas amanah dan akhirnya sebagai hadiah untuk anak perempuan mereka, Yap Yee Ling. Yap menyatakan Mahkamah Tinggi gagal untuk mempertimbangkan dengan mencukupi bahawa semasa 15 tahun perpisahannya daripada Hee, dia tidak pernah memberikan apa-apa sumbangan kewangan kepada aset yang diperolehi, juga dia tidak menjaga kebajikan rumah perkahwinan atau menjaga keluarga. Mengenai nafkah, Yap menyatakan Mahkamah Tinggi tidak patut campur tangan dengan nafkah

RM3,000 sebulan yang dibayar olehnya kepada Hee sebelum pemberian *decree nisi*, kerana dia tidak pernah mengadu bahawa jumlah tersebut tidak mencukupi.

Diputuskan, membenarkan sebahagian rayuan dan: (a) mengetepikan perintah-perintah Mahkamah Tinggi berkaitan rumah Wisma Pantai, dusun, hartanah Nilai, klinik, stok dan saham, premium polisi dan pangsapuri; (b) mengesahkan perintah-perintah Mahkamah Tinggi berkaitan rumah perkahwinan dan tanah kubur; (c) memerintahkan pihak-pihak memegang hartanah Australia atas amanah bagi anak perempuan mereka, Yap Yee Ling; (d) memerintah Yap untuk membayar jumlah nafkah Hee sekaligus sebanyak RM8,150; (e) mengurangkan syer dalam wang EPF kepada satu perempat; dan (f) memerintahkan tiga kereta Yap dijual dan keuntungan dibahagikan sama rata di antara pihak-pihak tetapi memberi salah satu pihak opsyen untuk memilik satu atau lebih daripada kenderaan tersebut subjek kepada salah satu pihak membayar sebahagian nilai pasaran kenderaan kepada pihak yang satu lagi:

(1) Jika Parlimen telah berniat bahawa kesemua asset yang mana diperolehi semasa perkahwinan patut dibahagikan, ia akan dengan jelas berbuat sedemikian. Ia bukan untuk mahkamah untuk mengisi apa-apa jurang dari segi undang-undang dan mengubal peruntukan Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 dengan meluaskan skop relif berdasarkan atas bidang kuasa lain yang mana tidak mempunyai peruntukan *pari materia* (lihat perenggan 6).

(2) Pembahagian hartanah sepencarian — yang berkaitan kepada hartanah yang diperolehi oleh usaha bersama pasangan suami isteri dan terangkum di bawah s 76(1) Akta — boleh dibenarkan sebagai hak. Tetapi hartanah bukan sepencarian — iaitu hartanah yang diperolehi melalui usaha tunggal seorang suami atau isteri dan terangkum di bawah s 76(3) Akta atau hartanah yang terangkum di bawah s 76(5) — pembahagian tidak dibenarkan sebagai hak kecuali Akta jelas menyatakannya atau diperuntukkan untuk methodologi untuk berbuat sedemikian. Mahkamah mempunyai budi bicara untuk berurusan dengan hartanah bukan sepencarian secara adil (lihat perenggan 3, 5 & 14).]

Notes

For cases on division of assets, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4623–4631.

Cases referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109, CA (refd)
Jerry WA Dusing @ Jerry W Patel & Anor v Majlis Agama Islam Wilayah (MAIWP) & Ors [2016] MLJU 735, CA (refd)
Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863, CA (refd)

Koay Cheng Eng v Linda Herawati Santoso [2004] 6 MLJ 395, HC (refd)
Lim Bee Cheng v Christopher Lee Joo Peng [1997] 4 MLJ 35, HC (refd)
Lim Kuen Kuen v Hiew Kim Fook & Anor [1994] 2 MLJ 693, HC (refd)
Mohan Raj ST Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor [2005] 4 MLJ 444, HC (refd)
Ong Chin Ngoh v Lam Chin Kian [1992] 2 SLR 414, HC (refd)
Phua Beng Hong v Ho Shik Ho [2000] 2 MLJ 289, CA (refd)
In re Borthwick, Decd Borthwick and another v Beauvais and others [1949] Ch 395, Ch D (refd)
Sivanes a/l Rajaratnam v Usha Rani A/p Subramaniam [2002] 3 MLJ 273; [2002] 3 CLJ 300, CA (distd)
Usha Rani a/p Subramaniam v Sivanes Rajaratnam [1998] 5 MLJ 24, HC (distd)
Watchel v Watchel [1973] 1 All ER 829, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76, 76(1), (2), (2)(c), (3), (4), (4)(a), (4)(b), (5), 78
Rules of the Court of Appeal 1994 r 18(1)

Appeal from: Divorce Petition No 33–367–06 of 2014 (High Court, Shah Alam)

Chia Wen Chow (Chia Wen Chow & Assoc) for the appellant.
Brian Ernest Cumming (Ashvinpal Kaur with him) (Gideon Tan Razali Zaini) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/husband petitioner's appeal in respect of distribution of matrimonial assets and/or orders for payment, etc; came up for hearing on 30 June 2016 and upon hearing we reserved judgment and requested parties to submit as to meaning of matrimonial assets within the frame work of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA 1976'). My learned brothers Abdul Rahman bin Sebli JCA and Prasad Sandosham Abraham JCA have read the draft judgment and approved the same.

PRELIMINARIES

[2] At the outset, it must be stated that the related matrimonial legislation in England, Singapore, etc in respect of division of matrimonial assets is not one and the same. The jurisprudence in almost all jurisdiction attempts to make a distinction between matrimonial assets and non-matrimonial assets and assets which were acquired before the marriage. As a general rule, assets

which were acquired before the marriage are excluded in most of the jurisdictions in which we often rely as judicial precedent.

[3] Section 76 of the LRA 1976 does not define what is matrimonial asset. For purpose of convenience, we propose to classify the matrimonial assets into two parts. One is matrimonial property which will fall under s 76(1) and the other is non-matrimonial property which will fall under s 76(3) and/or (5) of the LRA 1976. Whether it is a matrimonial or non-matrimonial property, both will fall under the caption of matrimonial assets. The classification of matrimonial property will relate to property acquired by joint efforts of the spouse, (see s 76(1) of the LRA 1976). Non-matrimonial property will relate to property acquired through the sole effort of one spouse, (see s 76(3) of the LRA 1976). There is one more category of matrimonial assets that the Act sets out. That is related to property acquired before the marriage and it is set out in s 76(5) of the LRA 1976. The division on this asset can be said to be very remote unless the conditions set out in the section is satisfied.

[4] The real challenge and ambiguity in division of properties upon the dissolution of marriage arises in relation to property acquired during the marriage. When it relates to matrimonial property (or home) ie the house (or more than one) and all movable and immovable assets in the house or having nexus to the house, such as a car, etc. which is meant to be used by the family, the courts have generally acknowledged that it falls under matrimonial property which will fall under s 76(1) of the LRA 1976, provided it was acquired by the joint efforts of the spouses though one spouse may not have contributed in cash but the consideration may have been in kind. The nexus appears to be the enjoyment and use. If there is no enjoyment and/or use for current common purpose, it will appear the nexus test may not be satisfied. In this respect, future funds such as EPF, insurance, pension, etc may not fall in this category.

[5] Other assets which does not fall into the category of matrimonial property but acquired by the sole effort of one spouse during the subsistence of marriage which we have referred to as non-matrimonial property but may qualify as matrimonial assets pursuant to s 76(3) of the LRA 1976. When it relates to matrimonial property, the division of the assets is a well recognised principle in Malaysia. However, when the assets fall under the category of non-matrimonial property, the division is not permissible as of right unless the Act clearly says so or provides for a methodology to do so. That is to say, for matrimonial property, the division is of right but non-matrimonial property the division is not as of right.

[6] Common sense will dictate if Parliament had intended that all assets which were acquired during the marriage ought to be divided, it will have

clearly done so. It is not for the court to fill any gap in the law and construct the provision of the Act by widening the scope of relief based on other jurisdiction which does not have pari materia provision (see *Jerry WA Dusing @ Jerry W Patel & Anor v Majlis Agama Islam Wilayah (MAIWP) & Ors* [2016] MLJU 735). We will deal with the issue of matrimonial assets (ie matrimonial and non-matrimonial property) further in the judgment with a note that the submission of the parties stood inadequate and/or partisan despite our request to enlighten us. The submission did not tackle the issues confronted by the court in extensor.

[7] In addition, it is paramount duty of the court in dealing with distribution of assets under s 76(1) or (3) to protect the interest of the minor children. This duty is expressly stated in s 76(2)(c) and 76(4)(b) specifically. Courts have gone to expand the meaning of matrimonial assets to benefit one of the spouses but have failed to apportion the assets to be held in trust for the benefit of the minor children (see *Koay Cheng Eng v Linda Herawati Santosa* [2008] 4 MLJ 863 (CA); *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693; *Ong Chin Ngoh v Lam Chin Kian* [1992] 2 SLR 414). For example, EPF money which may fall under s 76(3) or (5) has been ordered by courts to be apportioned to the wife even in the presence of minor children. The appropriate order if at all, if the court takes the view that the EPF money must be dealt with, it must order the part to be withdrawn and to be held in trust by both parties for the benefit of the minor children with the necessary consequential orders.

BRIEF FACTS

[8] It is not in dispute that the marriage lasted for 37 years. There are children at the age of 29 to 33 years and all having their own careers and have settled outside Malaysia. The respondent was a nurse who had supported the petitioner as well as the family when the petitioner who was a medical doctor did his post graduate — dermatology course in London. After the birth of her last child, the respondent status was a homemaker.

[9] The breakdown of the marriage took place about 15 years before the petition was presented. Both parties were staying separately in the same matrimonial home at Damansara Jaya, despite the breakdown of the marriage. The learned judicial commissioner had captured the facts of the case in the judgment and we will not labour on the facts, save where necessary. The order of the High Court in this appeal has been summarised by the respondent and reads as follows:

> 13.1 The Respondent is to transfer her half (1/2, share in the property at No. 28, SS 22 A/6, Damansara Jaya, 47400 Petaling Jaya, Selangor Darul Ehsan ('Matrimonial Home') to the Petitioner and the

Petitioner is to pay the Respondent RM800,000.00 in cash or alternatively, the Matrimonial Home is to be sold and the proceeds less the outstanding loan to be divided evenly within 3 months from the date of this Decree Nisi;

13.2 The Respondent is entitled to half (1/2) share of the Property at No. 35C Forest Road Miranda, NSW, 2228 Australia;

13.3 The Respondent is to move into the condominium known as Residence 8, Jalan Seri Jati Mukim Petaling, Kuala Lumpur within 3 months from the date of this Decree Nisi and in the event the Respondent declines to move in the said condominium, the Petitioner shall pay the Respondent the sum of RM3,150.00 a month to rent a suitable place;

13.4 The Petitioner is to purchase a new car Honda Civic 2.0 vehicle for the Respondent in her name within 3 months from the date of this Decree Nisi and the Respondent is allowed to use the Peugeot 308 vehicle bearing Registration Number WVH8082 in the interim. The Petitioner is entitled to retain the Toyota Camry bearing registration in number ABB 987, Ford Everest bearing registration WUJ 6602 and Peugeot 308 bearing registration number WVH 8082;

13.5 The Petitioner shall pay the Respondent half (1/2) of the overall balance of RM124,506.30 in the Petitioner's EPF account within 60 days from the date of this Decree Nisi;

13.6 The Petitioner shall pay to the Respondent maintenance in the sum of RM5,000.00 per month from 1st June 2015;

13.7 The Petitioner shall transfer the ownership of Burial Plot No. DDC-08-015 at Nilai Memorial Park Xiao En Centre to the Respondent within 3 months from the date of this Decree Nisi;

13.8 The Petitioner is to sell off the matrimonial assets at B-3-3 Level 3, Block B, Wisma Pantai, Pantai Plaza, No. 5, Jalan 4/83A, Off Jalan Pantai Baru, 59200 Kuala Lumpur ('Wisma Pantai House'), Shop lot in Nilai and Durian Orchard at Lot 2874, Title No. GM 834, Sg Muntoh, Mukim of Glami Lemi, District of Jelebu, Negeri Sembilan within 3 months from the date of this Decree Nisi and 1/3 of the proceeds is to be paid to the Respondent;

13.9 The Petitioner is to sell off the business known as Yap Skin Klinik at No. 17A, Lorong Raja Hassan, 41400, Klang and pay the Respondent 1/2 of the proceeds of sale within 3 months from the date of this Decree Nisi;

13.10 The Petitioner is to pay to the Respondent 1/3 of the value of the stocks and/or shares bearing stock code 1295, 1562, 1724, 3859, 4324, 5183, 5237, 6033, 6181 and 7100 in Affin Hwang Investments Bank Berhad Account No. 068 062 023997828 within 3 months from and at the value calculated as at the date of this Decree Nisi; and

13.11 The Petitioner is to pay the annual premium of the Respondent's medical insurance policy with Pacific Insurance IMA-R0090749-W1 Plan: C.

Decree Nisi dated 9.7.2015 at pp.34-40 Vol 1 ROA.

[10] The order of the High Court relates to 13 items and the petitioner is only appealing on nine items as reflected in the memorandum of appeal. The memorandum of appeal which is in the form of submission is reproduced below with a note that it strictly does not comply with the Rules of the Court of Appeal 1994 (see r 18(1) of the RCA 1994). The said memorandum of appeal, inter alia, reads as follows:

Order for division of assets

[1] Having regard to the totality of the evidence adduced by both parties at the full trial and the Respondent's pleaded case, the Learned JC erred in law and in fact in making the Decree Nisi dated 09/07/2015 (hereinafter called *Nisi Order),* ordering the *division* or *sale and division of the sale proceeds* of, inter alia, the following assets acquired by the Appellant during the subsistence of the marriage (hereinafter called *'the Assets')* in the following *proportions* in favour of the Respondent, which is grossly unjust and excessive in nature:

(a) the Respondent shall transfer her one half *(1/2)* share in the property at No. 28, SS 22 A/6, Damansara Jaya, 47400 Petaling Jaya, Selangor Darul Ehsan *('Damansara Property')* to the Appellant in consideration of cash payment of RM800,000.00 to be paid by the Appellant or alternatively, the Damansara Property is to be sold within three (3) months from the date of the Nisi Order with the sale proceeds thereof (after deducting the outstanding loan) to be divided by both parties in equal share;

(b) one half (1/2) share of the property at No. 35C, Forest Miranda, NSW, 2228 Australia *('Australia Property')*;

(c) one half (1/2) share of the Appellant's practice known as Yap Skin Klinik at No. 17A, Lorong Raja Hassan, 41400 Klang, Selangor Darul Ehsan *('the Clinic')*;

(d) one half (1/2) share of the overall balance of RM 124,506.30 in the Appellant's EPF Account *('EPF Monies');*

(e) one third (1/3) share of the property at B-3-3, Level 3, Block B, Wisma Pantai, Pantai Plaza, No. 5, Jalan 4/83A, Off Jalan Pantai Baru, 59200 Kuala Lumpur *('Wisma Pantai House');*

(f) one third (1/3) share of the Shop Lot at Nilai *('Nilai Property');*

(g) one third (1/3) share of the Durian Orchard at Lot 2874, Title No. GM 834, Sg Muntoh, Mukim of Glami Lemi, District of Jelebu, Negeri Sembilan *('Sg Muntoh Orchard');* and

(h) one third (1/3) share of the stocks and/or shares bearing stock code 1295, 1562, 1724, 3859, 4324, 5183, 5237, 6033, 6181 and 7100 in Affin Hwang Investment Bank Berhad Account No. 068 062 023997828 *('Stocks & Shares').*

[2] The Learned JC erred in law and in fact in allowing the Respondent's claim for division of the Australia Property, Wisma Pantai House, Nilai Property, Sungai Muntoh Orchard and the Stocks & Shares and in failing to hold that the same ought to be refused on the following grounds:

(a) The Appellant and Respondent had separated *about 15 years ago* before the filing and/or hearing of the Divorce Petition;

(b) The Australia Property, Wisma Pantai House and Nilai Property and Sungai Muntoh Orchard were acquired by the Appellant after the separation of the parties, i.e. the same were acquired *about 10 years* ago;

(c) These properties were not matrimonial assets; the Appellant and the Respondent had never lived in any or all of these properties and that the same were purchased by the Appellant for investment purposes and rental income;

(d) The Stocks and Shares were acquired by the Appellant about *5* years ago purely for 'leisure and/or investment' purposes, which was about 10 years *after* the separation of the parties;

(e) It was never the Appellant's intention to acquire such assets for any benefit of the Respondent and also as part of the continuing resources for the benefits of both of them as spouses as a whole;

(f) The Respondent failed to produce any single iota of evidence to prove that these 'after-acquired-assets' were part of the matrimonial assets; and

(g) The Respondent's claim is misconceived and without basis.

Division of Damansara Property, 1/2 share of the Australia Property, EPF Monies and the Clinic

[3] The Learned JC erred in law and/or in fact in failing to consider or failed to give adequate consideration to the fact that the Respondent's claim for division of the Assets ought to be solely governed by Section 76(4) of the Law Reform (Marriage & Divorce) Act 1976 (hereinafter called 'LRMDA') and the principles of law enunciated thereunder, based on the undisputed fact that the Assets were acquired by *sole effort* of the Appellant without any financial contributions from the Respondent. By reason thereof, the Learned JC erred in law in awarding the division of *one half (1/2) share* of the Damansara Property, Australia Property, the Clinic and EPF Monies in favour of the Respondent. Such order for 'equality of division' clearly contravenes Section 76(4) LRMDA and ought not to be upheld.

[4] The Learned JC erred in law and/or in fact in failing to consider that S76(4) LRMDA expressly *curtails* the court's discretion by ensuring a *greater proportions* of division of assets or sale proceeds thereof to be granted to the 'acquiring spouse' (i.e. the Appellant) *or alternatively,* lesser proportion of such division to the 'non-acquiring spouse" (i.e. the Respondent) who merely provided

contribution-in-kind to the welfare of the family.

[5] The learned JC erred in law and/or in fact in failing to consider that the registration of the Respondent's name as one half (1/2) share owner in the Issue Document of Title of Damansara Property and the Title Deed of the Australia Property shall not preclude the court from exercising the powers and principles under S76(4) LRMDA for 'readjusting or reallocating' the parties' respective share in the said properties.

(a) The court's statutory discretion under S76(4) LRMDA cannot be displaced by the parties' intention, whether or not assets or interests in such assets was intended as a gift or otherwise, to ensure the supremacy and non-violation of S76(4) LRMDA; and

(b) The principle of indefeasibility of title or registration of real property under one party's name cannot displace the discretion of the court under Section 76(4) LRMDA.

Australia Property held under both parties' names

[6] The Learned JC erred in law and/or in fact in failing to hold that both the Appellant and the Respondent shall be ordered to hold the Australia Property on trust for the benefit of their daughter, Yap Yee Ling, in view of the sufficiency of incontrovertible evidence given by both parties during the full trial that the same was intended to be gifted to the said Yap Yee Ling in any event.

Division of 1/3 share of Wisma Pantai House, Nilai Property, Sg Muntoh Orchard and the Stocks and Shares

[7] The Learned JC erred in law and/or in fact in awarding *one third (1/3) share* of the Wisma Pantai House, Nilai Property, Sg Muntoh Orchard and the Stocks and Shares in favour of the Respondent. Such award is excessive in nature taking into account of, inter alia the following factors:

(a) The *extent* of (non-financial) contribution made by the Respondent *is insufficient* to justify the award of one third (1/3) share: S76(4)(a) LRMDA;

(b) There are *no minor children* of the marriage as at the date of hearing of the Divorce Petition. All three (3) children of the marriage have attained the age of 30, 32 and 34, graduated with professional qualifications and excelled with remarkable achievement in their careers respectively. The Respondent is no longer encumbered by having to take care of *the needs* of any minor children: s 76(4)(b) LRMDA;

(c) The Respondent had not provided contributions or failed to provide adequate contributions to look after the welfare of home and care for the family since she separated with the Appellant about 15 years ago; and

(d) Hence, the 1/3 share award ought to be set aside or substituted with a *reduced* award.

Factors for consideration in exercising discretion under s 76 LRMDA

[8] The learned Judge erred in law and/or in fact in failing to consider or failed to give adequate consideration to the following factors in granting the *above 1/2 share*

and 1/3 share award which are excessive in nature:

(a) The Respondent never provided any financial contributions towards acquisition of the Assets;

(b) The *duration of separation* between the Appellant and the Respondent notwithstanding the 'subsistence' of the marriage;

(c) The strain relationship between the parties during the separation; and

(d) 'The needs of minor children' under S76(4)(b) is no longer an issue for consideration.

Had the Learned JC given proper consideration to the above factors, she would have arrived at a different conclusion by ordering a *much lower* proportion in the division of the share of assets in favour of the Respondent.

Nilai Property

[9] The Learned JC erred in law and/or in fact in making an order for sale of the Nilai Property and division of 1/3 share of the sale proceeds in favour of the Respondent on the following grounds:

(a) The Nilai Property does not 'exist' at the date Nisi Order;

(b) This property was purchased by the Appellant in the year of 1997 and registered under his sole name; and

(c) It was sold at a loss and at the price of RM155,000.00 in the year of 2005.

The Clinic

[10] The Learned JC erred in law and/or in fact in ordering the sale of the Clinic with one half (1/2) of its sale proceeds to be apportioned in favour of the Respondent on the following grounds:

(a) The Respondent is not legally entitled to any share in the Clinic as there is no single iota of evidence to prove that she ever involved in making financial contribution to the Clinic, in the setting up, administration and management of the Clinic;

(b) The Clinic is the Appellant's 'bread and butter', his livelihood and sole source of income;

(c) The Learned JC imposed very onerous obligations on the Appellant under the Nisi Order, in particular, *Prayer 3* (pertaining to payment of RM3,150.00 towards monthly loan instalments for the 'Residence 8 Condominium' and/or rentals of RM3,150.00 for the Respondent if she chooses to reside elsewhere other than the Residence 8 Condominium), *Prayer 4* (purchasing a new Honda Civic 2.0 for the Respondent valued at about RM124,000.00) and *Prayer 6* (RM5,000.00 being monthly maintenance for the Respondent). *Hence, the Appellant is required to pay a sum amounting to approximately RM14,800.00 per month (i.e. RM3,150.00 + RM3,150.00 + RM5,000.00 + RM3,500.00 being payment of monthly instalment for Honda Civic 2.0) to 'maintain' the Respondent.*

(d) The Appellant will only be able to perform all his obligations in strict compliance with the Nisi Order if he is allowed to run the Clinic which generates income for the Appellant;

(e) It would be unrealistic, impracticable and unjust to order the Appellant to sell the Clinic in the best interests of all parties. If the Clinic is sold, it would cause financial predicament and grave hardship to the Appellant.

(f) *The Appellant is currently 65 years old and his health is deteriorating attributable to illnesses such as 'colon cancer, colonic polips, gastritis, Reflux esophagitis, gastric polyps', 'atrial fibrillation/flutter, hypothyroidism, diabetes mellitus, borderline hypertension', and 'paroxysmal atrial fibrillation and atrial flutter'.*

(g) The Appellant is therefore unfit and is unable to work as hard as before;

(h) *Alternatively,* if the Respondent's claim is sustainable (which is denized), she ought to be awarded a division of less than 14 share as ordered by the Learned JC.

Accommodation

[11] The Learned JC erred in law and/or in fact in ordering the Respondent to move into a condominium known as Residence 8, Jalan Seri Jati, Mukim Petaling, Kuala Lumpur or alternatively, if the Respondent chooses to rent another premises, the Appellant shall pay the Respondent a sum of RM3,150.00 per month being payment of monthly rental thereof ('hereinafter called *'Accommodation Order').*

(a) The LRMDA does not give the court any power to make Accommodation Order;

(b) The express wording of Section 76 only provides the court with the power to order division of matrimonial assets at the time of granting a decree of divorce.

The Car

[12] The Learned JC erred in law and/or in fact in holding that the Appellant is required to purchase a new car bearing Model Honda Civic 2.0 for the Respondent and in failing to consider that:

(a) The Appellant had already purchased a Peugeot 308 vehicle for the use of the Respondent about four (4) years prior to the Nisi Order;

(b) A car is a depreciating asset. Giving its depreciating nature, it is *extremely unfair and unjust* to order the Appellant to 'replace' the Peugeot 308 with a new Honda Civic 2.0;

(c) The Respondent failed to adduce any evidence or evidence of valuation that she ought to be awarded a new Honda Civic 2.0; and

(d) There is no basis for the Learned JC to make such order.

EPF Monies

[13] The Learned JC erred in law and/or in fact in ordering an equality of division of the EPF Monies between the Respondent and the Appellant.

(a) Having regard to the facts of the case, the Respondent shall be disentitled from claiming for the division of the EPF Monies;

(b) Paragraphs 3, 4 and 7 above are reiterated;

(c) Alternatively, giving that Section 76(4) provides a statutory requirement of awarding a greater proportion in favour of the party who acquires the matrimonial assets, the Respondent being a 'non-acquirer' ought to be awarded less than one half (1/2) share of the EPF Monies.

Maintenance for the Respondent

[14] The Learned JC erred in law and/or in facts in awarding a sum of RM5,000.00 being wife's maintenance in favour of the Respondent, which the Appellant contends as being unjust and excessive:-

(a) At all material times until the date of Nisi Order, the Appellant has been giving a monthly payment of RM4,000.00 to the Respondent (which was subsequently reduced to RM3,000.00) towards maintenance of her life;

(b) The Respondent had never made any complaint or protest to the Appellant about the insufficiency or inadequacy of such amount of maintenance;

(c) The Nisi Order for wife's maintenance is for sole purpose of protecting and providing the Respondent to survive the similar rigours of life after divorce but not unjustly enriched her.

(d) Hence, the Learned Judge was erred in law and/or in fact in failing to have regard to the undesirability of disturbing the sum of RM3,000.00 paid by the Appellant before the date of Nisi Order.

Stocks and Shares

[15] The Learned JC erred in law and/or in fact in awarding 1/3 share of the Stocks and Shares to the Respondent. Paragraphs 2c), 3, 4 and 7 are repeated *in toto.*

Insurance Policy

[16] The Learned JC erred in law and/or in fact in ordering the Appellant to pay the annual premium of the Respondent's medical insurance policy with Pacific Insurance IMA-R0090749-W1 Plan C.

(a) The said medical insurance policy is not a matrimonial asset;

(b) The LRMDA does not give the court any power to make such order;

(c) The express wording of Section 76 only provides the court with the power to order division of matrimonial assets at the time of granting a decree of

divorce.

(d) Even if the court has power to make such order (which is denied), an order for payment of less than one half (1/2) share of the annual premium will be more suitable and appropriate.

Non-compliance Divorce and Matrimonial Proceedings Rules, 1980 and rules of Pleadings

[17] The Learned JC erred in law and/or in fact to allow the Respondent's claim for a division or share in any or all of the Assets even though she has:

(a) failed to plead clearly that the same were matrimonial assets;

(b) failed to plead particulars in support of such claim;

(c) failed to rebut the Appellant's evidence at trial that any or all of the Australia Property, Wisma Pantai House, Nilai Property, Sg Muntoh's Orchard and/or Stocks and Shares were bought for investment purposes and not intended for the benefit of the Respondent, particularly in view that the same were purchased after separation of both parties.

[18] The Learned JC erred in law and/or in fact in that she has failed to take into consideration of the relevant law and/or facts in arriving at her decision and/or that she has taken into consideration of irrelevant facts in making the Nisi Order.

JURISPRUDENCE RELATING TO MATRIMONIAL PROPERTY AND NON-MATRIMONIAL ASSETS AND PROVISION FOR MAINTENANCE

Division of assets

[11] Section 76 of the LRA 1976 is the key statutory provision to deal with the division of the property. In principle, it differentiates assets acquired during the subsistence of marriage into three types. They are as follows:

(a) any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see s 76(1) of the LRA 1976);

(b) any assets acquired by one party by sole effort which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (see s 76(3) of the LRA 1976); and

(c) assets which were acquired before the marriage, but has been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not

fall in that category (see s 76(5) of the LRA 1976).

(See *Lim Bee Cheng v Christopher Lee Joo Peng* [1997] 4 MLJ 35; *Phua Beng Hong v Ho Shik Ho* [2000] 2 MLJ 289 (CA)).

The said s 76 reads as follows:

76 Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to —

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Maintenance

[12] The LRA 1976 specifically provides for maintenance in respect of spouses as well as for children, (see ss 77 and 93 of the LRA 1976). In determining the quantum, s 78 criteria must be followed strictly. Section 78 of the LRA 1976 states:

> Assessment of maintenance
>
> 78 In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

(See *Koay Cheng Eng v Linda Herawati Santoso* [2004] 6 MLJ 395; *In re Borthwick, Decd Borthwick and another v Beauvais and others* [1949] Ch 395).

General jurisprudence relating to matrimonial assets

[13] The Act does not define what matrimonial assets are. However, when the property had been acquired by joint efforts, it must be brought to account for purpose of distribution. The burden will appear to be on the person who alleges that it was acquired by joint efforts.

[14] As said earlier, the Act uses the phrase matrimonial assets and has three categories as set out. The first category will fall on the category of matrimonial property, ie property which the law recognises as subject to distribution. The other two categories of matrimonial assets are not matrimonial properties per se but discretion is given to the court to deal with it justly. In both the first and second category, the paramount consideration will appear to be for the court to take into consideration the needs of minor children. That is to say, a portion or substantial portion of the assets must be reserved for the benefit of the children before the division takes place between the competing spouses. Decisions of courts in the past have not taken into consideration, the courts duty towards children. Most of the decisions favours one of the spouse as opposed to the children. We must emphasise here that the 'minor children' interest is a paramount consideration before apportioning the assets to the spouses.

[15] Case laws does not throw much light on how the interest of 'minor children' is to be protected and what concession is to be given if one parent undertakes to pay the maintenance of the child, education, etc. Minor children is not an issue here.

[16] General meaning of matrimonial property or home as opposed to assets means movable or immovable property owned by one or both spouse which can be divided as of right upon dissolution of the marriage. The closest definition to 'matrimonial property' or home appears in s 76(1) of the LRA 1976 is related to the phrase of joint efforts which is not specifically defined. A working definition of matrimonial property in relation to s 76(1) is found in the decision of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 (CA), where the Court of Appeal opined that:

> During the subsistence of a marriage, the expression 'matrimonial assets' refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole.

[17] Lord Denning in reliance of the English Act then which is not pari materia to our Act, had in *Watchel v Watchel* [1973] 1 All ER 829 in relation to matrimonial assets opined as follows:

> It refer to those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provisions for them and their children during the joint lives, and used for the benefits of the family as a whole ... The family assets can be divided in two parts: (i) those which are of capital nature, such as the matrimonial home and furniture in it; (ii) those which are of a revenue-producing nature, such as earning power of husband and wife. When the marriage comes to an end, the capital assets have to be divided: the earning power of each has to be allocated.

[18] Lord Denning refers to as family assets and divides it into two parts. The first part of the definition is close to s 76(1) and the opinion stated in *Ching Seng Woah*'s case will be within the framework of the LRA 1976. However, the second part of Lord Denning's definition will not fall within the scope of s 76(1) of the LRA 1976 but it may to a limited extent fall within the provision of s 76(3) of the LRA 1976. Most certainly, the future earning power of the spouse for purpose of allocation of revenue cannot be taken into account under s 76, but can be taken into account for purpose of other provisions of the Act, such as maintenance, etc. and not division of property.

[19] Division of assets for which one spouse has no immediate right under the law to the asset such as the spouse, EPF or insurance or pension will not fall within the definition of matrimonial property. The assets which s 76(1) refers to are movable and/or immovable property which can immediately be divided among the spouses. If the EPF monies, etc are already due to be withdrawn then such assets may fall within provision of s 76(3) of the LRA 1976. Even those monies if at all falls within the definition of matrimonial assets, it should as far as practicable be reserved partly for the welfare of minor children and/or

hold in their interest if minor interest is involved.

[20] What is important to note is that whatever assets which falls within the provision of s 76(1), that part of the assets must be divided subject to appropriate consideration to the 'minors' as stated earlier.

[21] In respect of assets relating to s 76(3) of the LRA 1976, there is no obligation for the courts to exercise its discretion unless it warrants so, taking into consideration the commitment of the parties as well as the continuing contribution made by one spouse to the other including the children, etc.

[22] It is also doubtful whether professional practice and/or business can be a subject matter of division of assets when it stands as a source of income of one spouse though the court can take into consideration the earnings of one spouse in the professional practice and/or business to provide reasonable sum for maintenance to the other spouse or children. If professional practice or business of one spouse is asked to be sold to pay to the other it may cause travesty of justice and that per se would not be within the framework of s 76 of the LRA 1976.

[23] Whether the matrimonial assets falls under s 76(1) or (3) a spouse who asserts his/her claim, during the divorce petition, over division of the matrimonial property alleged to have been acquired by the other spouse must adduce evidence to prove that the same were acquired during the subsistence of marriage and for purposes of continuing resources of the spouses or their children or the family as a whole. In *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273; [2002] 3 CLJ 300 (CA) the court stated that where parties never lived in the property bought for investment purposes, it was not a matrimonial home. The Court of Appeal had held that:

> The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into consideration the factors laid down in s 76 of the Act. It must be remembered that the court is dividing matrimonial assets and *not* assessing damages.
>
> In dividing matrimonial assets pursuant to a divorce, the courts in Malaysia should pay special attention to the provisions of the Act and not rely uncritically on decided cases from other jurisdictions, except perhaps those from Singapore where the relevant law is similar. It is *not* advisable to rely ingenuously on English cases.

[24] Section 76(1) of the LRA 1976 leans toward equal distribution of the matrimonial property. However, equal distribution may not be just and equitable in all circumstances of the case. Learned author Wee Wui Kiat in the book titled 'Malaysian Law on Division of Matrimonial Assets' says:

[2.19] A spouse who has paid the mortgage instalments under a loan taken out for the purchase of a matrimonial home is considered to have made direct financial contribution under section 76(1) and (2) of the LRMDA. In *Koay Cheng Eng v Linda Herawati Santoso*, the Court considered that the matrimonial home was acquired by the husband who paid for the mortgage instalments while his wife made indirect financial contribution by utilising her salary towards upkeep of the household and the purchase of groceries.

[2.20] Direct financial contribution by paying for the monthly instalments of a housing bank loan would usually entitle the payer to a greater share of the divided matrimonial assets. In *Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan* the husband was awarded a 70 per cent share after he adduced evidence of his payment which included, inter alia, all monthly bank loan instalments, a personal cheque, EPF savings withdrawal towards financing the purchase, the taking out of a policy to insure the housing loan in the event of his death and account transfers of moneys on a regular basis and payment of utility bills.

The learned author on pp 126–127 makes the following observation:

Pre-existing intention to make gift cannot displace court's discretion

[3.90] As already discussed, it is a common occurrence in marriages for matrimonial assets to be registered in the joint names of both husband and wife in equal shares despite the fact that only one of the spouses had contributed financially towards their acquisition. Both parties might have envisaged that the non-acquirer obtained a half share as a gift from the acquirer. In many cases, it is fair to say that both parties might never even have turned their mind to ascertaining their common intention as to their respective legal and beneficial rights, at least not at the time of acquisition and registration of the property in their joint names, when divorce was not even remotely foreseeable. In any event, it is trite law that registration of a half share in joint names would not preclude the Courts from readjusting or reallocating the parties' respective shares exercising the powers and principles under section 76 of the LRMDA.

[3.91] The court's statutory discretion, conferred either by section 76(2) or 76(4), cannot be displaced by the parties' intention, whether or not an asset or interest in such asset was intended as a gift. Vincent Ng Kim Khoay J in *Lim Bee Cheng v Christopher Lee Joo Peng* emphasised the importance of ensuring the supremacy and non-violation of the section 76 principles when dividing matrimonial assets, when he said:

In any event, even if this Court accepts the petitioner's assertion that the half (1/2) share of the matrimonial home registered in her name was I intended as a wedding gift, it nevertheless cannot displace the discretion of the Court, be it

A under s 76(2) or 76(4) of the Act ... (Emphasis added.)

In *Phua Beng Hong v Ho Shik Ho* [2000] 2 MLJ 299 (CA), Denis Ong JCA had this to say:

> B The High Court had in mind the provisions of s 76(1), (2), (3) and (4) relevant to the different nature of form of the contributions of the respondent and of the appellant in relation to the evidence presented and the argument advanced. On this score, its conclusions of fact that asset No 3 was acquired by the sole effort of the respondent, the latter having contributed directly in the form of money derived from the sale of his separate property to the purchase price and the contribution of C the appellant was to the welfare of the family by her work or services as a wife, a mother and a daughter-in-law were correct and well justified. It was never in dispute that the appellant did not contribute in the form of money or property whatever to the purchase price of asset No 3.
>
> D *Under* s 76(3) and (4) *of Act 164 which governed the division of asset No 3, the High Court was empowered to divide asset No 3 as it thought 'reasonable'. Given the mandatory direction to the High Court in* s 76(4) *namely, 'but in any case the party by whose effort the assets were acquired shall receive a greater proportion', it made no sense to talk of 'fairest result' in the sense of evenness in the result of asset No 3. In short, the result was bound to be uneven.*

E

[25] Having set out the general jurisprudence relating to matrimonial assets, we will now deal with the correctness of the order of the learned judicial commissioner. As per the submission of the appellant:

F (a) submission (a) relates to Damansara property, where among other alternatives the court in principle has given one half (1/2) share in the property. This property clearly falls within the provision of s 76(1) and was bought during the subsistence of the marriage. The marriage has lasted for more than three decades. There is also no dispute that the respondent has contributed in kind for the court to lean in favour of G distribution of this asset on an equal basis with alternative option within the parameters of justice and equity. The property is also jointly owned by the parties and has been treated as a matrimonial home. We do not see any reason to intervene in this part of the order;

H (b) submission (b) relates to property in New South Wales, Australia, where one half (1/2) share was given to the respondent. This property was registered in the joint names of the parties.

The property was said to have been bought by the petitioner from his sole efforts for the use of the daughter Yap Yee Ling, who is said to be staying I there since about five years ago. It was said that both parties have expressed their intention to transfer their respective 1/2 share to the said daughter. The said property clearly will not fall under s 76(1) where the intention for the purchase of the property was not to be used as a matrimonial home. This property will satisfy the provision of s 76(3)

(sole effort) and it was wrong for the learned judicial commissioner to have allotted equal shares, more so when the parties during trial had shown clear intention to transfer the property to the name of the daughter. The division in equal shares will be in breach of s 76(4).

The appropriate order will be to order a transfer of their shares to the daughter. If it is subject to encumbrance to financial institution, the petitioner and the respondent ought to hold the said property in trust for their daughter Yap Yee Ling.

We take the view that the said order of the learned judicial commissioner should be substituted to say that the Australia property is held in trust for the daughter Yap Yee Ling. By making such an order, the petitioner will not be obliged in law to continue with any financial commitment on the property without obtaining proper indemnity from the daughter (who is above 21 years old), though he may have to settle the financial obligation to the financiers. An order directing that the petitioner and respondent are holding the property in trust for the daughter will be just and equitable in the circumstance of the case, (see *Mohan Raj ST Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor* [2005] 4 MLJ 444);

(c) submission (c) relates to Yap Skin Clinic, where the business was ordered to be sold and one half (1/2) share to be given to the respondent. We find that this order to be oppressive and was made without proper appreciation of s 76 of the LRA 1976.

Firstly, a professional practice is related to 'personal to holder' principle. Generally, professional body may not allow a professional to be a partner with a non-professional. Secondly, a professional practice is meant to be the source of income for the spouse to meet up with other financial commitment for himself and in the case of divorce, maintenance provision under the LRA 1976. In ordinary terms, it will not be just and equitable to 'kill the goose which lays the golden egg'.

Further, we find it difficult to stretch the provision of s 76 to say that a professional practice should be treated as an asset and apportioned. A professional practice cannot fall under s 76(1) as that criteria is for matrimonial home. The test for matrimonial home or property to fall under s 76(1) must be assets or revenue generating assets without the participation of either spouse.

For the same reason, a professional practice will not fall under s 76(3). In addition, it will not be unreasonable to say that in a professional practice, goodwill will be related to the practitioner. The professional practice may have no value without the presence of the practitioner itself. Basically, all these reasoning are related to common sense and the Act could not have

envisaged to create hardship, unjust and inequitable disposition for one spouse.

In our view, a professional practice or business which is the primary source of income of a spouse should not fall under s 76 of the LRA 1976, though it will be important criteria to be considered for maintenance of the other spouse and/or children. In this respect, the case of *Usha Rani a/p Subramaniam v Sivanes Rajaratnam* [1998] 5 MLJ 24 and *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273; [2002] 3 CLJ 300 (CA) must be distinguished. In *Sivanes*'s case, both the spouses were medical doctors. In that case the High Court had ordered that the husband pay the wife RM200,000 being the respondents entitlement of one-third of the income from the medical clinic. The facts and the contribution made by the spouses were different from the facts of the case. In any event, the court in *Sivanes*'s case did not order to 'kill the goose which lays the golden egg'. This proverb is necessary to take into consideration to reach a just result in matrimonial cases as the court's duty is to divide not salvage the property of one spouse to pay in the form of damages to the other spouse. In our view, the order to sell the practice and divide the proceeds must be set aside;

(d) submission (d) relating to moving into the condominium at Jalan Seri Jati, Mukim Petaling or pay to the respondent the sum of RM3,150 a month to rent a suitable place. We do not think that this order falls within the provision of s 76 but such an order for payment as rental can be included in the maintenance provision of the Act as the appellant has a viable professional practice. We take the view that this order should be set aside and the rental amount should be included in relation to maintenance order which we will deal with shortly;

(e) submission (e) relates to the buying of a new car Honda Civic 2.0 and in the meantime usage of Peugeot 308 as well as Toyota and Ford Everest. We do not think it is proper to make such an order in particular to buy a new Honda Civic under s 76 of the LRA 1976. The just and equitable order within s 76 is to sell the Toyota, Peugeot and Fort Everest and divide the proceed equally, with liberty for any spouse to purchase any one or more of the vehicle according to the market price acceptable to other spouse and pay half the sum of its market price only to the other spouse;

(f) submission (f) relates to the amount in the EPF fund. We do not think EPF monies can fall strictly under s 76(1) of the LRA 1976 unless statute strictly provides for. EPF funds are personal to holder and there are provisions under the EPF Act for the contributor to nominate any person or persons to benefit from the EPF contribution. For example, the contributor can nominate the mother or disabled family members in the family including the children. To say that EPF money will fall under

s 76 of the Act for distribution to the wife may not be correct in law. On the peculiar facts of the case, taking into consideration that the children are all grown up and well settled, and the petitioner husband has no mother or siblings, etc. to support, the EPF fund can be a subject matter of distribution pursuant to s 76(3) of the LPA 1976.

EPF money which has been accumulated on the sole effort of the husband petitioners cannot be a subject matter of equal distribution. In fact, the court is not obliged to divide the EPF money at all when it falls under the provision of s 76(3). As we have disturbed the order related to the clinic and there is some evidence to say that the respondent's family members has contributed towards the clinic, we take the view on the special facts of the case the order in relation to EPF should be sustained on just and equitable basis. However, the sum ought to be reduced to quarter as opposed to half the EPF sum ordered by the court, taking into consideration the provision of s 76(3) and/or (4);

(g) submission (g) relates to maintenance amount of RM5,000. We take the view that the maintenance amount should be one lump sum payment to include the rental amount stated earlier as well as other reasonable obligation of the respondent to pay the insurance premium, etc. We will make a global award as to maintenance shortly in the judgment;

(h) submission (h) relates to the transfer of the burial lot to the respondent. As this part of the order is not on appeal, we sustain the said order;

(i) submission (i) relates to the sale of Wisma Pantai house, shop lot in Nilai and Durian orchard in the district of Jelebu, and one third proceeds to be given to the respondent. These properties fall within the provision of s 76(3) and in fact there is no obligation for the court to order a division of the assets. In fact, the Nilai property has been sold in 2005. When the property has been sold before the divorce petition, it may not fall for division under s 76 of the Act.

Taking a holistic view of the facts of the case and the big lump sum order for maintenance which we are going to make, we do not think it is just and equitable to sustain this part of the order. Accordingly, we will set aside this part of the order;

(j) submission (j) which relates to pay 1/3 value of shares in Affin Hwang Investment Account, we take the view that it falls under s 76(3) and in consequence the court has no obligation to divide the same as of right. In this case, as we are granting a lump sum maintenance order, it will be unjust and inequitable to dissolve investment account or businesses, etc; as it will tantamount to 'killing the goose that lays the golden egg'. If there is no revenue such as the business and investment account as well as investment properties, then the husband/petitioner will not be in a position to pay the lump sum maintenance payment which we think is

substantial taking into consideration the assets and income in issue; and

(k) submission (k) which relates to payment of premium for medical insurance policy — we take the view that it should be set aside as it does not fall under s 76 assets.

[26] For reasons stated above, we take the view that the appeal must be allowed in part. The order as per decree nisi dated 9 July 2015 is to be amended to read as follows:

(a) order (1) which relates to Damansara property to be sustained;

(b) order (2) which relates to property in New South Wales, Australia to be substituted to say that the said property in the joint names of the petitioner and respondent to be held in trust for the daughter of the marriage 'Yap Yee Ling';

(c) order (3) which relates to condominium at Jalan Seri Jati, Mukim Petaling Jaya, is set aside;

(d) order (4) relates to the cars be substituted to read as follows:

> The Toyota, Peugeot and Ford Everest to be sold and the proceed to be equally distributed with liberty for any spouse to purchase one or more of the vehicle as per the market price acceptable to the other spouse. In such event, to pay only half the sum of the market price only to the other spouse.

(e) order (5) in respect of the EPF is sustained, subject to the sum to be reduced to 25 percent of the sum of RM124,506.30 in the appellant's EPF account;

(f) order (6) the order for maintenance to be varied for reasons stated in our judgment to read as RM8,150 only;

(g) order (7) as to the burial ground is sustained;

(h) order (8) which relates to Wisma Pantai house and durian orchard in the district of Jelebu, to be set aside;

(i) order (9) which relates to Yap Skin Clinic, be set aside;

(j) order (10) which relates to shares in Affin Hwang Investment Account is set aside; and

(k) order (11) which relates to premium for medical insurance policy is set aside.

[27] In consequence, the appeal is partly allowed with no order as to costs. Deposit is to be refunded.

We hereby order so.

Order accordingly.

Reported by Ashok Kumar